REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2013/8895

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

4/10/2013 .....
DATE SIGNATURE

In the matter between:

FIRSTRAND BANK LTD N.O. AS TRUSTEE FOR THE EMIRA PROPERTY FUND First Applicant

STRATEGIC REAL ESTATE MANAGERS (PTY) LTD Second Applicant

and

THE HEAVEN GROUP (PTY) LTD Respondent

J U D G M E N T

MASHILE, AJ:

[1] The First Applicant being a trustee of the Emira Property Fund and the Second Applicant as a manager of the Emira Property Scheme instituted an

action against the Respondent following the latter's failure to pay monthly rentals as envisaged in the lease agreement concluded by the parties on 29 June 2012.

[2] The Respondent served and filed its notice of intention to defend and the Applicants in response launched these summary judgment application proceedings in terms of Rule 32 of the Uniform Rules of this court because it believes that the Respondent has no *bona fide* defence and is merely defending the case for purposes of delay.

[3] The Respondent has raised two preliminary points and a defence on the merits. The points *in limine* are that the Second Applicant has been incorrectly joined to these proceedings and that the deponent to the founding affidavit has no personal knowledge of the facts of this matter. On the merits the Respondent contends that the Applicants have overcharged it on certain items. The amounts have been calculated and now constitute specific figures.

[4] A logical method of dealing with this is obviously to attend to the preliminary points and then turn to the Respondent's defence on the merits.

THE DEPONENT TO THE FOUNDING AFFIDAVIT DOES NOT HAVE PERSONAL KNOWLEDGE OF THE FACTS

[5] I am surprised that with the plethora of authority that we have on this subject defences of this nature continue to be raised from time to time. In

Paragraph 2 of the affidavit in support of summary judgment Mr Thorburn states:

> "*In my capacity as such, the claims of First Plaintiff / First Applicant against the Defendant / Respondent fall under my control and I have personal knowledge of the records and facts relating thereto and of the amounts owing by Defendant / Respondent to First Plaintiff / First Applicant. I have in fact studied the records relating hereto. I am able to and do swear positively to and verify the facts, causes of action and amounts set out in the summons with particulars of claim and in this affidavit and confirm such to be both true and correct.*"

[6] In support of its argument that the deponent lacks personal knowledge of the facts, the Respondent mentions the fact that the deponent was not copied on some of the correspondence between it and the Applicants. The point is that he is in control and in fact he has studied the records relating to this matter. The Respondent will need far more than just a mere lack of a person being copied on one or two e-mail messages or letters to convince the court that the deponent does not have personal knowledge. Without further elaboration the Respondent's argument is thin and accordingly stands to be rejected. If the Respondent wants this court to believe that the converse is true it needs to supply reasons why it adheres to that view. See in this regard *Firstrand Bank Ltd V Ego Specialised Services CC* 2012 JDR 0057 (GSJ), *Nigel Colin Tattersall & Andrews v Nedcor Bank Ltd* 1995 (3) SA 222 (A) at pp 228f-229c, *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423A-424H) and *Firstrand Bank Ltd v Carl Beck Estates and Another* 2009 (3) SA384 (TPD).

INCORRECT JOINDER OF THE SECOND APLICANT

[7] The Applicant is in reality, in terms of the Collective Scheme Act No. 45 of 2002, a collective investment scheme whose assets need to be under the control of a trustee. In terms of Section 68 the trustee is appointed by the manager of the scheme. Sections 2 and 4 stipulate that the scheme must be managed by a manager of the collective investment scheme. It follows that the First Applicant could not have launched this application without making the manager of the scheme part of these proceedings. The second point *in limine* must of necessity fail too.

[8] The lease agreement concluded by the parties contains an acknowledgement by the Respondent that it is indeed indebted to the Applicants in the amount of R621 471.40 for rent and ancillary charges that were then due, owing and payable to the Applicants. It is also true that the Applicant has already paid part of the amount that it owes to the Respondents. Annexure "D" of the lease agreement reads:

> "*1. ACKNOWLEDGMENT OF DEBT*
>
> *1.1 The tenant hereby acknowledges that as at date of signature hereof the tenant is indebted to the landlord in the amount of R621 471.40, (six hundred and twenty-one thousand rand four hundred seventy one rand and forty cents) (the debt) in respect of rental and ancillary charges, which amount is now due, owing and payable.*"

[9] Moreover, the lease agreement includes 'no variation except in writing' and 'no representation and warrantees were made' clauses. This of course implies that the Respondent was not unduly influenced or induced into signing the lease agreement. The no variation clause precludes the Respondent from relying on extrinsic evidence. The Respondent finds itself in a rather invidious position in that while it may have genuine concerns regarding the amount that it owes to the Applicants, it cannot resile from the contract because it has acknowledged its indebtedness.

[10] If the Respondent feels aggrieved by this turn of events, a remedy does not lie here. It may have to institute another action or launch an application challenging the validity of the acknowledgment of debt that it signed claiming the amount by which it believes it has been overcharged. The existence of the acknowledgment of debt, however in my view, to a large extent seals the Respondent's fate and that observation is fortified by the statement of Innes CJ in *Wells v South African Illuminate Company* 1927 AD 69 1927:

> "*No doubt the condition is hard and onerous; but if people sign such conditions they must, in the absence of fraud, be held to them. Public policy so demands. "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. (Per JESSEL, M.R in Printing Registering Co. v Sampson, L.R. 19 Eq at p. 466.)*"

[11] I do not see any need to discuss the other points raised by the Respondent as to do so is simply superfluous. The cases to which the Respondent referred me especially on the point of costs cannot apply. Yes, the Respondent did write to the Applicant alluding to what he regarded as a possible defence to the claim, but the existence of the acknowledgment of debt means that those defences cannot oust the claim of the Applicants.

[12] The respondent also claims that it does not have beneficial occupation and cannot therefore be expected to pay rentals for premises from which it is practically deriving no benefit at all. The Respondent however remains in occupation and besides the acknowledgment of debt will always come back to haunt it. In this regard one needs to bear in mind that the amount that the Respondent owes to the applicant does not relate to the current lease but the previous one hence the Applicant ostensibly persuaded the Respondent to sign an acknowledgment of debt. Quite apart from all this, the lease agreement also provides:

> *"rental is payable monthly in advance on the 1st day of the month without deduction or set off;*
>
> *the landlord is not obliged to effect any improvements or alteration to the leased premises and the landlord may engage in construction in or around the property which may result in inconvenience to the tenant;*
>
> *the Defendant shall not have any claim of whatsoever nature for reduction or abatement of basic monthly rental or cancellation of the agreement other than expressly contained in the agreement;*
>
> *in the event of the landlord failing to maintain the property, the tenant's only remedy is a right for specific performance after giving 14 days' written notice."*

[13] On the face of these provisions of the lease agreement, which the Respondent signed, the application for summary judgment must succeed. Accordingly, I make the following order:

1. Summary judgment is granted in the amount of R224 849.07;

2. Interest thereon at the rate of 10.5% per annum from 2 March 2013 to date of payment;

3. The Respondent is to pay the costs of this application on the scale as between attorney and client.

B MASHILE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Date of Hearing: 13 May 2013

Date of Judgment: 4 October 2013

Applicants Counsel: Adv. J.G Dobie
Instructed by Reean Swanepoel

Respondents Counsel: Adv. K Lavine
Instructed by Alan Levy Attorneys